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No. 95-83

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1995

ALAN MEGHRIG AND MARGARET MEGHRIG,
Petitioners

vs.

KFC WESTERN, INC.,
Respondent

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

Brief of Kaufman and Broad Home Corporation and Kaufman and Broad — South Bay, Inc. As Amici Curiae Supporting Respondent

WILLIAM N. KAMMER
Counsel of Record
J. MARTIN ROBERTSON
ROBERT C. LONGSTRETH
LARRY J. BRADFISH

GRAY CARY WARE & FREIDENRICH
A Professional Corporation
401 B Street
Suite 1700
San Diego, California 92101
(619) 699-2711

400 Hamilton Avenue
Palo Alto, California 94301
(415) 328-6561

Counsel for Kaufman and Broad Home Corporation and Kaufman and Broad — South Bay, Inc.

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QUESTION PRESENTED

Whether Section 7002(a)(1)(B) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(1)(B), authorizes a private party to seek restitution of its costs of cleaning up solid or hazardous wastes which may present an imminent and substantial endangerment to health or the environment?

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Brief of Kaufman and Broad Home Corporation and Kaufman and Broad — South Bay, Inc. As Amici Curiae Supporting Respondent

Kaufman and Broad Home Corporation and Kaufman and Broad — South Bay, Inc. (collectively "Kaufman and Broad") respectfully submit this amici curiae brief in support of the Respondent, KFC Western, Inc. Kaufman and Broad have obtained the written consent of the parties as required by Rule 37.3 of the rules of this Court.

STATEMENT OF INTEREST OF AMICI CURIAE

Kaufman and Broad — South Bay, Inc. is a real estate development company that developed for residential use approximately one hundred acres of real property in

Milpitas, California. After discovering that hundreds of barrels of toxic waste had been dumped and buried on the property years before by others, Kaufman and Broad — South Bay spent over $26 million to remedy the dangerous conditions at the site. Kaufman and Broad — South Bay, Inc. is a wholly owned subsidiary of Kaufman and Broad Home Corporation. Subsidiaries of Kaufman and Broad Home Corporation develop homes throughout the State of California. In October, 1992, Kaufman and Broad — South Bay filed an action in the United States District Court for the Northern District of California, captioned *Kaufman and Broad — South Bay, Inc. v. Unisys Corporation, et al.*, No. C-92-20677 EFL, which remains pending in that court. On May 7, 1993, in an order published at 822 F. Supp. 1468 (N.D. Cal. 1993), the district court dismissed that portion of Kaufman and Broad — South Bay, Inc.'s complaint that seeks restitution of response costs under Section 7002(a)(1)(B) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a)(1)(B).

Petitioners here seek the reversal of a decision of the United States Court of Appeals for the Ninth Circuit that expressly "disapprove[s] of the reasoning used by district courts that have dismissed complaints brought under section 6972(a)(1)(B) [of RCRA] to the extent the plaintiffs sought reimbursement of clean-up costs." *KFC Western, Inc. v. Meghrig*, 49 F.3d 518, 523 (9th Cir. 1995). In the ruling challenged here, the Ninth Circuit specifically identifies the district court order dismissing Kaufman and Broad — South Bay's claim for restitution of response costs as one of the two decisions it criticized. Accordingly, the Ninth Circuit's decision, which is binding on the United States District Court for the Northern District of California, makes it clear that the order dismissing Kaufman and Broad — South Bay, Inc.'s claim for equitable restitution of its response costs cannot stand.

On July, 25, 1995, Kaufman and Broad — South Bay, Inc. moved the district court to reinstate its claim for restitution of response costs under section 7002(a)(1)(B) of RCRA in light of the Ninth Circuit's decision.[1] On September 11, 1995, the District Court granted Kaufman and Broad — South Bay, Inc.'s motion.[2] If the Ninth Circuit's decision is reversed in this case, Kaufman and Broad — South Bay, Inc. will lose an important means of recovering from the responsible parties the millions of dollars it has spent to remedy dangerous environmental contamination that it did not create.

SUMMARY OF ARGUMENT

This case involves the construction of the citizen suit provision set forth in Section 7002(a)(1)(B) of RCRA, 42 U.S.C. § 6972(a)(1)(B). The Ninth Circuit, in determining what it described as "a question of first impression," ruled that "the RCRA citizen suit provision authorizes a private plaintiff to collect restitution of clean-up costs." *KFC Western, Inc. v. Meghrig*, 49 F.3d 518, 520 (9th Cir. 1995).

The Ninth circuit's decision is correct for three reasons. First, the broad language in Section 7002(a)(1)(B) of RCRA authorizes district courts "to take such other action as may be necessary" in cases in which private party plaintiffs establish the liability of other parties for conditions that may present an endangerment to the environment or

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[1] *See Kaufman and Broad — South Bay, Inc. v. Unisys Corporation, et al.*, No. C-92-20677 EFL, Plaintiff's Motion By Way of Reconsideration Or, In the Alternative, A Motion for Leave to Amend Its Complaint to Reinstate Claim for Restitution Against Unisys Corporation and In Support of Plaintiff's Motion to Add Claim for Restitution Against Trucking Companies (N.D. Cal. July 25, 1995).

[2] *See Kaufman and Broad — South Bay, Inc. v. Unisys Corporation, et al.*, No. C-92-20677 EFL, Order Granting Leave to File Third Amended Complaint (N.D. Cal. September 11, 1995).

health. 42 U.S.C. § 6972(a)(1)(B). Nothing in Section 7002(a)'s broad grant of jurisdiction restricts the district courts' jurisdiction — by words or inference — to granting injunctive relief, as petitioners suggest. The legislative history behind Section 7002(a)(1)(B) makes clear that Congress intended that Section 7002(a)(1)(B) confer the same rights on private parties that Section 7003 confers on the government, and that Section 7003 provides the government with a restitutionary remedy. Second, the private party in this case (like many other private parties in other cases) does not have adequate remedies under federal or state law against the polluters of contaminated property. And, third, it is important, for public policy reasons, to promote the cleanup of contamination by private parties who, without such incentive, might not engage in cleanup. A restitutionary remedy under RCRA Section 7002(a)(1)(B) promotes such cleanup.

As the federal appellate authority supporting the decision below attests, the Ninth Circuit's determination is clearly correct. The RCRA citizen suit provision is expressly directed to past conduct and expressly permits a court to order a party responsible for endangering health or the environment "to take such other action as may be necessary." 42 U.S.C. § 6972(a). This statutory language provides clear authority for a court to order a responsible party to make equitable restitution to those who have addressed and alleviated the dangerous condition. Contrary to petitioners' arguments, the Ninth Circuit has not created a new right of action by implication; it has simply recognized that the right of action already provided by Congress permits an order of equitable restitution.

ARGUMENT

I

The Ninth Circuit Correctly Determined That The RCRA Citizen Suit Provision Authorizes Private Parties To Seek Restitution Of Their Cleanup Costs.

A. The Broad Grant Of Authority In RCRA Section 7002(a)(1)(B) Allows The Court To Order A Party To Make Restitution.

Section 7002(a) of the Resource Conservation and Recovery Act ("RCRA")[3] authorizes any person to seek, on his or her own behalf, necessary relief against "any [other] person . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a).

In 1984, Congress amended Section 7002 of RCRA to allow private parties to sue responsible parties over situations in which solid or hazardous wastes may present an imminent and substantial endangerment to the environment or health. H.R.Rep. No. 189, 98th Cong., 2d Sess., pt. 1 (1984). Congress also added language authorizing district

[3] At the same time that Congress enacted RCRA, it enacted the Solid Waste Disposal Act. From the legislative history, it is unclear which act Congress enacted first. Section 1001 of Public Law 89-272, Title II, as amended by Public Law 89-272, October 21, 1976, 90 Stat. 2795, provides in part that Title II of Public Law 89-272 may be cited as the "Solid Waste Disposal Act." Section 1 of Public Law 94-580 provides that "This Act may be cited as the Resource Conservation and Recovery Act of 1976." The two acts are generally cited as the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976. But the two acts are sometimes cited as the Resource Conservation and Recovery Act, as amended by the Solid Waste Disposal Act.

courts "to take such other action as may be necessary" when private party plaintiffs establish the liability of other parties. *Id.* Section 7002(a) of RCRA contains the same language concerning the scope of equitable relief available to a private party as RCRA Section 7003, which authorizes the government to bring an action against responsible parties. 42 U.S.C. § 6972(a); 42 U.S.C. § 6973.

The court of appeals held that a private party plaintiff is entitled to restitution of its cleanup costs under Section 7002(a)(1)(B) of RCRA. The court squarely grounded its decision on the broad language in Section 7002(a)(1)(B) which authorizes district courts "to take such action as may be necessary" in cases in which private party plaintiffs establish the liability of other parties. By adding this language to Section 7002(a), Congress unquestionably intended the courts to have the same equitable authority in actions private parties bring under Section 7002(a)(1)(B) of RCRA that the courts have in actions the government brings under Section 7003 of RCRA. This broad equitable jurisdiction includes the authority to grant restitution as well as injunctive relief to private parties faced with contamination that may present an endangerment to the environment or human health.[4]

Unless specifically limited, Congress' grant of equitable jurisdiction to the courts is not restricted. The Court's equitable powers are presumed to include all of the traditional equitable powers that the courts have historically exercised. As this Court has stated:

> Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction."

Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946) (quoting *Brown v. Swann*, 35 U.S. 497 (1836)). *Accord California v. American Stores Co.*, 495 U.S. 271, 295 (1990); *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944).

Nothing in Section 7002(a)'s broad grant of jurisdiction restricts the district courts' jurisdiction — by words or inference — to granting injunctive relief, as petitioners suggest. Had Congress intended to impose such a limitation, it would have been a simple matter to draft the statute so that courts would be limited to ordering only "relief as may be necessary to abate such danger or threat," instead of broadly providing that courts may order responsible parties to take any necessary action. *Cf.* Section 106(a) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), which authorizes the President to require the Attorney General "to secure such relief as may be necessary to abate such danger or threat." 42 U.S.C. §9606(a).

The legislative history behind Section 7002(a)(1)(B) makes clear that Congress intended that Section 7002(a)(1)(B) confer the same rights on private parties that Section 7003 confers on the government. The House of Representatives stated that Section 7002(a)(1)(B) confers on private parties the right to bring actions "pursuant to the standards of liability established under Section 7003." H.R. Rep. No. 198, 98th Cong.,

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[4]Congress' broad grant of equitable jurisdiction under RCRA Section 7002(a)(1)(B) is discussed in detail in a recent article. See J. Martin Robertson, *Restitution Under RCRA § 7002(a)(1)(B): The Courts Finally Grant What Congress Authorized*, 25 Envtl.L.Rep. 10491 (September 1995).

2d Sess. pt. 1, at 53 (1984), reprinted in U.S.C.C.A.N. 5576, 5612. Similarly, the Senate stated that:

> These amendments [adding Section 7002(a)(1)(B)] are intended to allow citizens the same broad substantive and procedural claim for relief which is already available to the United States under Section 7003. Any differences in language between these amendments and 7003 are not intended to reflect a difference in such claims, but merely clarify that citizens have the same claim presently available to the United States.

S.Rep. No. 284, 98th Cong., 1st Sess., at 56-57 (1983).[5] Because Congress intended that citizen suits brought under Section 7002(a)(1)(B) confer the same rights as governmental actions brought under Section 7003, the relief available under the two provisions should be interpreted similarly. The court of appeals followed the interpretations of the language in Section 7003 by the Eighth Circuit Court of Appeals in *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373 (8th Cir. 1989) and the Third Circuit Court of Appeals in *United States v. Price*, 688 F.2d 204 (3d Cir. 1982) in its decision. This Court should, too.

Because neither Section 7003 nor Section 7002(a)(1)(B) restricts Congress' grant of equitable jurisdiction in any way, the Eighth Circuit's interpretation of Section 7003 in *Aceto* and the Ninth Circuit's interpretation of Section 7002(a)(1)(B) in this case are correct. Both sections authorize a restitutionary remedy: Section 7003 authorizes a restitutionary remedy for EPA and Section 7002(a)(1)(B) authorizes a restitutionary remedy for

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[5] *See* J. Martin Robertson, *The 'Lincoln Properties' Case: Shifting the Burden of Response*, 8 Tox.L.Rep. 1395, 1403-04 (May 11, 1994), for further discussion of this.

private parties.[6] Thus, restitution of reasonable cleanup costs should be available to private parties under Section 7002(a)(1)(B).

Petitioners contend that reimbursement of private parties for their costs of cleaning up contamination must be characterized as damages. That is not so. Reimbursement of the costs a private party expends to clean up contamination simply restores the party to the position it occupied before conducting the cleanup. The remedy by which the courts restore a party to its pre-cleanup position is restitution, not damages. The Fourth Circuit distinguished restitution from damages by stating that:

> "[a] person obtains restitution when he is restored to the position he formerly occupied either by the return of something which he formerly had or by the receipt of its equivalent in money." . . . Damages, on the other hand, are determined by reference to the loss sustained by a victim as a result of wrongful conduct on the part of another.

United States v. Long, 537 F.2d 1151, 1153-54 (4th Cir. 1975) (quoting Restatement of Restitution, § 1 Comment: a, at 12 (1937)), cert. denied, 429 U.S. 871 (1976).[7]

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[6] In the court of appeals' opinion, the dissent stated that "the language, 'such other action as may be necessary,' does not contemplate actions for reimbursement." 49 F.3d 518, 525 (Brunetti, J., dissenting). In so stating, however, the dissent ignored the general rule that the full scope of a court's equitable jurisdiction must be recognized and applied unless a statute restricts the court's equitable jurisdiction. *Porter v. Warner Holding Co.*, 328 U.S. 395, 398; *California v. American Stores Co.*, 495 U.S. 271, 295.

[7] Courts have issued mandatory injunctions requiring the payment of money on numerous occasions. *See Lincoln Properties, Ltd. v. Higgins*, 24 Envtl. L. Rep. 21068 (E.D. Cal. 1993). *See also United States v. Price*, 688 F.2d 204, 213 (3d Cir. 1982), citing *Crawford v. University of North Carolina*, 440 F. Supp. 1047 (M.D.N.C. 1977). Moreover, the

Equitable reasons buttress the legal ground for affirming the court of appeals' decision. The private party in this case (like many other private parties in other cases) does not have adequate remedies under federal or state law against the polluters of contaminated property.

CERCLA no more provides an adequate remedy precluding restitution under RCRA Section 7002(a)(1)(B) than it provides an adequate remedy precluding injunctive relief under RCRA Section 7002(a)(1)(B). Recently, several courts have limited private parties' abilities to recover response costs under CERCLA.[8] In addition, in 1994, this Court severely restricted the recoverability of attorneys' fees

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Eighth Circuit Court of Appeals and every district court that has addressed the issue has held that a claim for recovery of response costs under CERCLA, an environmental statute like RCRA, is not an action at law for money damages but is instead an equitable action. *See United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 749 (8th Cir. 1986) (holding that when the government seeks response costs it is "seeking equitable relief in the form of restitution or reimbursement of the costs it expended in order to respond to the health and environmental danger presented by hazardous substances"). *See also Hatco Corp. v. W.R. Grace & Co. — Conn.*, 859 F.Supp. 769, 774 (D.N.J. 1994), *Thaler v. PRB Metal Products, Inc.*, 810 F.Supp. 49, 50 (E.D.N.Y. 1993) (both cases applying the *Northeastern* rule to actions between private parties). *See also United States v. Mottolo*, 605 F.Supp. 898, 912-13 (D.N.H. 1985) (citing seven cases that characterize recovery of response costs under CERCLA as equitable relief).

[8]The Courts of Appeals for the First, Seventh, and Tenth Circuits have ruled that only private parties who are "innocent" — that is, who are not liable under CERCLA — may bring cost recovery actions under CERCLA Section 107(a). Under these decisions and a ruling by the District Court for the Northern District of California, liable private parties who cannot recover their response costs can do no more than seek contribution from other liable parties under CERCLA Section 107(a). *See United Technologies v. Browning-Ferris Indus., Inc.*, 33 F.3d 96 (1st Cir. 1994), cert. denied, _U.S._, 115 S.Ct. 1176 (1995); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761 (7th Cir. 1994); reh'g en banc denied (7th Cir. 1994); *United States v. Colorado*

under CERCLA Section 107.[9] In the wake of these recent CERCLA decisions, an action for restitution under Section 7002(a)(1)(B) offers several distinct advantages over a CERCLA Section 107(a) cost recovery action or a CERCLA Section 113(f)(1) contribution action. First, RCRA Section 7002(a)(1)(B) applies to a broader range of contamination than CERCLA. Section 7002(a)(1)(B) can be used to obtain restitution of private parties' costs of responding to solid and hazardous wastes as broadly defined in RCRA Sections 1004(5) and 1004(27), whereas CERCLA can only be used to recover private parties' costs of responding to hazardous substances as defined in CERCLA. 42 U.S.C. § 6903(5) (defining "hazardous waste" as used in RCRA); 42 U.S.C. § 6903(27) (defining "solid waste" as used in RCRA); and 42 U.S.C. § 9601(27) (defining "hazardous substances" as used in CERCLA).[10] Second, to be recoverable under RCRA Section 7002(a)(1)(B), private parties' response costs need only be incurred in response to conditions that may present an imminent and substantial endangerment to the environment or health, and need only be reasonable. In contrast, CERCLA allows private parties to recover only those costs of cleanup that are necessary and consistent with the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"). 42 U.S.C. § 9607(a)(4)(B).[11] Third, under RCRA Section

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& E.R.R., 50 F.3d 1530 (10th Cir. 1995); *Kaufman & Broad — South Bay, Inc. v. Unisys Corp.*, 868 F.Supp. 1212 (N.D.Cal. 1994).

[9]*Key Tronic v. United States*, _U.S._, 114 S.Ct. 1960 (1994).

[10]For succinct explanations of these terms, see J. Martin Robertson, *The 'Lincoln Properties' Case: Shifting the Burden of Response*, 8 Tox.L.Rep. 1395, 1401-02. *See also* Adam Babich, *RCRA Imminent Hazard Authority: A Powerful Tool for Businesses, Governments, and Citizen Enforcers*, 24 Envtl.L.Rep. 10122, 10124-27 (March 1994).

[11]Proving consistency with the NCP can be difficult and burdensome because of the evidence that must be offered, even though some courts only require private party plaintiffs to demonstrate substantial compli-

7002(a)(1)(B), private parties may impose joint and several liability for restitution of all response costs on the parties who contributed to the handling, storage, treatment, transportation, or disposal of solid or hazardous waste. *See Lincoln Properties, Ltd. v. Higgins*, 23 Envtl.L.Rep. 20665, 20672 (E.D.Cal. 1993) (concluding that the defendants' liability under RCRA Section 7002(a)(1)(B) was joint and several). And, fourth, RCRA Section 7002(e) specifically provides that courts may award litigation costs, including reasonable attorneys' fees, expert witness fees and other litigation expenses, to private parties who prevail or substantially prevail in an action under Section 7002(a)(1)(B) of RCRA. By contrast, private parties generally may not recover attorneys' fees associated with prosecuting cost recovery actions under CERCLA. State law does not provide an adequate remedy either.

Finally, it is important, for public policy reasons to have a restitutionary remedy under RCRA Section 7002(a)(1)(B). The availability of restitution under Section 7002(a)(1)(B) will promote the cleanup of contamination by private parties who, without such incentive, might not engage in cleanup. Prompt, private cleanup was an objective Congress intended to promote when it amended Section 7002(a) in 1984.[12] The Ninth Circuit was right to recognize the importance of this objective.

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ance with the NCP. *See, e.g., Wickland Oil Terminals v. ASARCO, Inc.*, 792 F.2d 887, 891-92, (9th Cir. 1986); *NL Indus. v. Kaplan*, 792 F.2d 896, 898-99 (9th Cir. 1986) (holding that a private-party plaintiff need not show strict compliance with the NCP to establish consistency with its provisions); *see also* 40 C.F.R. § 300.700(c)(3)(i); 55 Fed.Reg. 8666, 8858 (Mar. 8, 1990) (providing that a private-party plaintiff need only show substantial compliance with the NCP to establish consistency with its provisions).

[12]The courts have recognized that Congress amended the RCRA citizen suit provision in 1984 to "invigorate citizen litigation" and to "provide a private means of obtaining the same relief that the EPA has

Addressing Congress' intent in *Bayless Investment & Trading Co. v. Chevron U.S.A., Inc.*, the Arizona District Court noted that:

> If this court were to adopt a rule that would allow a plaintiff to obtain an injunction to require responsible parties to clean up the contamination but would not allow the same plaintiff to recover the costs that he has spent in initiating prompt [cleanup], the court would provide future plaintiffs with an incentive to wait until the conclusion of a lawsuit before spending money to commence remediation. Such a ruling would frustrate clearly delineated congressional objectives and be contrary to the purposes of RCRA.

39 Envtl. Rep. Cas. 1428, 1432 (D. Ariz. May 1994).

B. The Petitioners Inappropriately Apply The Analysis Under *Cort v. Ash* To Determine The Extent Of Relief Available Under RCRA Section 7002(a).

Petitioners incorrectly apply the analysis for an implied private right of action under *Cort v. Ash*, 422 U.S. 66 (1975), to assess what relief may be available under the RCRA citizen suit provision which is expressly set forth in Section 7002(a) of RCRA, 42 U.S.C. § 6972(a). It is clear that Congress, in enacting RCRA Section 7002(a), created an express right of action for private parties to sue under RCRA. Because of this, the Court need not conduct an

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previously been authorized to seek under RCRA." *Lincoln Properties, Ltd. v. Higgins*, 23 Envtl.L.Rep. 20665, 20669-70 (citing *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1158 (9th Cir. 1989)); *Middlesex County Bd. of Chosen Freeholders v. New Jersey*, 645 F.Supp. 715, 721 (D.N.J. 1986).

analysis under *Cort v. Ash* to determine whether an implied right of action exists. The Eighth Circuit Court of Appeals was wrong in doing so in *Furrer v. Brown*, 62 F.3d 1092 (8th Cir. 1995), which was decided after the Ninth Circuit entered its decision in this case.

The issue before the Court is not whether a private right of action should be implied under RCRA Section 7002(a)(1)(B), but whether Section 7002(a)'s provision empowering the court to "order . . . such other action as may be necessary" affords restitution to private parties. 42 U.S.C. § 7002(a)(2). *See also Anderson v. Thompson*, 658 F.2d 1205, 1210 n.7 (7th Cir. 1981). Clearly, "[t]he question of what remedies are available under a statute that provides a private right of action is 'analytically distinct' from the issue of whether such a right exists in the first place." *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 65-66 (1992); *Davis v. Passman*, 442 U.S. 228, 239 (1979); *Lieberman v. Univ. of Chicago*, 660 F.2d 1185, 1186-87 & 1187, n.4 (7th Cir. 1981). Moreover, the determination of what relief is available under a private right of action must not be considered until *after* a court determines whether the private right of action exists at all. *Cf. Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 69 (1992) ("Whether Congress may limit the class of persons who have a right of action under Title IX is irrelevant to the issue in this lawsuit. To reiterate, 'the question whether a litigant has a "cause of action" is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive.'")

Clearly, the *Cort v. Ash* analysis is an inappropriate vehicle for determining the extent of relief available under an express private right of action. Indeed, other courts have previously rejected the application of the *Cort v. Ash* analysis to determine available remedies under a expressly created private right of action. For example, the Eighth Circuit

rejected the application of the *Cort v. Ash* analysis in interpreting the extent of relief provided by an express right of action under the Education of the Handicapped Act, which authorizes "such relief as the [district] court determines is appropriate." *See Miener v. Missouri*, 673 F.2d 969, 979 (8th Cir. 1982) (quoting 20 U.S.C. § 1415(e)(2)).

The correct analysis for determining the extent of relief available under an express right action involves statutory interpretation, including consideration of "the statutory language, the legislative history, and the purposes Congress wished to achieve." *See Anderson v. Thompson*, 658 F.2d 1205, 1210 (7th Cir. 1981). It does not involve using a *Cort v. Ash* analysis to determine whether a private litigant is entitled to relief under the federal statute.

II

The Ninth Circuit Correctly Determined That Restitutionary Relief Is Available To Private Parties Where Private Parties Responded To Conditions Which May Present An Endangerment Before Filing Suit.

Petitioners contend that the RCRA citizen suit provision may never be used where an imminent and substantial endangerment presented by the disposal of wastes has been remedied before suit is filed. Petitioners argue that the Ninth Circuit's contrary holding is barred by this Court's decision in *Gwaltney v. Chesapeake Bay Found.*, 484 U.S. 49, 52, 66-67 (1987), which held that citizen suits may not be brought for "wholly past violations" of the Clean Water Act.[13] Petitioners' argument is specious.

Unlike the Clean Water Act provision, the RCRA citizen suit provision expressly allows suits concerning past conduct.

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[13]The Clean Water Act was formerly known as the Federal Water Pollution Control Act ("FWPCA").

Indeed, *Gwaltney* itself specifically cited Section 7002(a)(1)(B) of RCRA for the proposition that "Congress has demonstrated in yet other statutory provisions that it knows how to avoid this prospective implication by using language that explicitly targets wholly past violations." *Gwaltney v. Chesapeake Bay Found.*, 484 U.S. 49, 57 (1987). Petitioners' attempt to rely upon *Gwaltney* for the proposition that "wholly past harms" (which, of course, cannot be meaningfully distinguished from "wholly past violations") are not redressable under RCRA is misplaced.

Moreover, as noted above with respect to *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), the citizen suit provision of the Clean Water Act does not contain the critical language allowing a court to order "such other action as may be necessary." Accordingly, *Gwaltney*, like *Sea Clammers*, cannot be relied on to dictate a limiting construction of that language. Contrary to petitioners' assertions, the statutory language actually used in RCRA does matter, and the significant differences between this language and the provisions of other environmental statutes precludes an attempt to fabricate an overarching "history" or "purpose" of citizen suits that overrides the express statutory text.

Both the Eighth and the Ninth Circuits have concluded that the "imminent and substantial endangerment" language limits the sites as to which a RCRA action can be filed, not the time at which such an action should be filed. *KFC Western, Inc. v. Meghrig*, 49 F.3d at 521; *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d at 1383. Petitioners do not cite a credible authority to the contrary; instead, they rely on *Gwaltney* for their argument that a RCRA suit is barred when the imminent and substantial endangerment has been addressed before suit is filed. Because there is no dispute here that the site has posed an "imminent and

substantial endangerment," RCRA was appropriately utilized with respect to the contamination at the site.

Petitioners' narrow interpretation of the "may present an imminent and substantial endangerment" language of Section 7002(a)(1)(B) would effectively foreclose all lawsuits where a plaintiff took the initiative to clean up contamination before it dispersed. Prospective plaintiffs would have to litigate their RCRA claims before they could clean up contamination to preserve their ability to recover restitutionary relief. Meanwhile, contamination would continue to seep into the soil and groundwater. Clearly, this is not what Congress had in mind when it enacted RCRA. Congress sought to facilitate the prompt abatement of contamination which may present endangerment to health or the environment when it enacted RCRA.

Conclusion

For all these reasons, the decision of the United States Court of Appeals for the Ninth Circuit in this case should be affirmed.

Dated: December 7, 1995.

Respectfully submitted.

WILLIAM N. KAMMER
Counsel of Record

J. MARTIN ROBERTSON
ROBERT C. LONGSTRETH
LARRY J. BRADFISH

GRAY CARY WARE &
FREIDENRICH
A Professional Corporation
401 B Street, Suite 1700
San Diego, California 92101
619-699-2711

400 Hamilton Ave.
Palo Alto, California 94301
415-328-6561

Counsel For Kaufman And Broad Home Corporation And Kaufman And Broad — South Bay, Inc.